Mining Federal “Golden Nuggets”
Hot, New, Must-Know Cases

June 25, 2021
Western District of Missouri

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Use It/Cite It: The Wagstaffe Group Practice Guide

**Many of You Already Have it!

@JWagstaffeLxNx
In May of 1983, Hazelwood East High School's Principal, Ryan Reynolds, was asked to review the final draft of Hazelwood's student newspaper, The Spectrum before it was printed and distributed.

In his reading, he discovered two student articles which he found to be inappropriate for younger readers.

Under the impression that there was insufficient time to edit the articles before printing, he cut them out.

The students who wrote the articles felt that their First Amendment right to freedom of the press had been violated by Reynolds' censoring of The Spectrum's contents.

They decided to take Reynolds and the school district to court over the matter.

The case began in District Court, and was afterward brought to the Court of Appeals, then finally moving to the Supreme Court.
Mining Tools

FRCP & Title 28


WD Missouri

PowerPoint Slides

2021 Jurisdictional Update
Mining for Nuggets

Subject Matter "Jurisdiction"

Federal Question Jurisdiction

Spokeo Standing

Twiqbal and Erie RR

Personal Jurisdiction & Forum Selection
Golden Nugget #1: What is “Jurisdictional”? 

Fort Bend County, Texas v. Davis (2019) 139 S.Ct. 1843
“Jurisdictional”? Title VII case brought without identifying particular claim in EEOC filing. Post appellate remand, MTD claim for failure to exhaust. Is motion to dismiss jurisdictional or can it be waived by delay?
Not Jurisdictional

Fort Bend County, Texas v. Davis (2019) 139 S.Ct. 1843

Full exhaustion of remedies with EEOC is a claims processing, not jurisdictional, rule

Wickfire, L.L.C. v. Woodruff (5th Cir. 2021) 989 F.3d 343—absence of protectable mark in Lanham Act case not jurisdictional; Sanzone v. Mercy Health (8th Cir. 2020) 954 F.3d 1031—existence of an ERISA plan not jurisdictional; U.S. ex rel Ambrosecchia v. Paddock Labs (8th Cir. 2017) 855 F.3d 949—public disclosure bar for FCA not jurisdictional; see see TWG § 5-IV
Jurisdictional?

- Time Limits
- Exhaustion
- Missing Element
Golden Nugget #2: 
*Spokeo* Standing?

*Thole v. U.S. Bank*  
(2020) 140 S.Ct. 1615
Is there *Spokeo* Standing?

Two retired plan participants sue to challenge plan fiduciaries’ investments.

Retirement benefits don’t fluctuate with value of plan or as a result of allegedly adverse fiduciary investments.

MTD for lack of standing?
Thole v. U.S. Bank (2020) 140 S.Ct. 1615

- Plaintiffs lack standing as they have no concrete stake in lawsuit as outcome of suit would not affect future benefits

Standing

Injury in Fact

Likelihood Injury Redressed by Favorable Decision

Nexus: Injury & Causal Conduct

Yeransian v. B. Riley FBR, Inc. (8th Cir. 2021) 984 F.3d 633—no injury in fact for those suing under contract for additional compensation for contingent money owed by third party
Is there *Spokeo* Standing?

**D attempted to collect unpaid credit card debt and in dunning letter falsely overstated amount owed.**

**Plaintiff alleged statutorily noncompliant letter violated her rights under FDCPA and alleged she was annoyed and consulted a lawyer, but otherwise didn’t allege any harm.**

**MTD for lack of standing?**
Nettles v. Midland Funding LLC (7th Cir. 2020) 983 F.3d 896

- No concrete injury traceable to false representation in letter; mere violation of statute (FDCPA) insufficient

See Auer v. Trans Union, LLC (8th Cir. 2018) 902 F.3d 873—disclosure violations of FCRA without injury means no standing; Flecha v. Medicredit, Inc. (5th Cir. 2020) 946 F.3d 762—class members receiving false dunning letter lack FDCPA standing if ignored as junk mail; Thomas v. Toms King (6th Cir. 2021) 997 F.3d 629—no standing when leaving credit card number on receipt caused no injury; cf. Cranor v. 5 Star Nutrition, LLC (5th Cir. 5/26/21) 2021 U.S. App. LEXIS 15795 – standing shown under TCPA claim for autodial texts to cell phone since affects battery life
Five Essential Tips for Surviving the Supreme Court’s Tectonic Changes to the Meaning of “Jurisdiction” and the Spokeo Standing Earthquake

When Dorothy reacted to the earthshaking storm by telling Toto they weren’t in Kansas anymore, she was expressing what litigators may feel when examining the tectonic changes underway in the U.S. Supreme Court as to what is meant by “subject matter jurisdiction” and Article III standing. And make no mistake about it, surviving these tremors means more than a quick reading of the hot-off-the-press June 2019 decision in Fort Bend County as the latest word on jurisdiction and other recent cases addressing the Spokeo juggernaut.

“Jurisdiction” – the Word With Limited Meaning under Fort Bend County

reaffirmed that “the word ‘jurisdictional’ generally is reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction).” In contrast, reasoned the Court, an exhaustion requirement—even if mandated by statute—is a claims-processing rule that will be enforced if properly raised, but one that may be forfeited if the party waits too long to raise the point.

Thus, the High Court continued its attack on what it calls the “profligate use” of the term “jurisdiction” in situations where Congress did not expressly and clearly describe the
Miner’s Tips

• Subject Matter Jurisdiction First

• Read Statute’s Jurisdictional Label

• Remember *Spokeo* standing is jurisdictional, so apply “no harm, no foul” rule in statutory violation cases (original and removal)

• And stay tuned for SCOTUS decision in *TransUnion, LLC v. Ramirez* as to whether every member of class must have standing
Four Doorways to Federal Court

- **Front Door**: Arising Under
- **Visitors’ Door**: Complete Diversity
- **Back Door**: Removal = Orgin. Juris.
- **Side Door**: Same Trans.
Golden Nugget #3: The Missing Federal Claim

Gunn v. Minton
(2013) 568 U.S. 251
Minton loses federal patent suit

Minton sues attorney Gunn for malpractice

Question: Motion to Dismiss for lack of Subject Matter Jurisdiction?
GRANT

Gunn v. Minton (2013) 568 U.S. 251

- Malpractice claim does not “arise under” federal law

See C.J. v. Truman Med. Ctr., Inc. (W.D. Mo. 2020) 2020 U.S. Dist. LEXIS 111915 (Kays, J.)—no federal jurisdiction over state law claims of theft of personal information on laptop even if HIPPA issues implicated;

Tisdale v. Pagourtzis (S.D. Tex. 2020) (Brown, J.)—no Grable jurisdiction over state claim against ammunition seller to school shooter even if reference made to federal criminal statute
Pleading a securities fraud claim asserting a banana is a federal security

*Carr v. Tillery* (7th Cir. 2010) 591 F.3d 909; *Arnold v. U.S.* (N.D. Cal. 2020) (Van Keulen, J.)--mind abduction allegation jurisdictionally insubstantial
Fun Miner’s Case - 2021

*Castro v. U.S.* (S.D. Tex. 4/13/21)  
(Eskridge, J.)

P asserts he is God and reasons that since the U.S. Treasury is “government under God” he’s entitled to control of all Treasury funds.

**Holding:** No subject matters jurisdiction or standing.

And *Bivens Ain’t What It Used to Be*

**Hernandez v. Mesa** (2020) 140 S.Ct. 735—no *Bivens* implied cause of action unless (1) it is precisely akin to context of one of the three claims (*Bivens/Carlson/Davis*) recognized before, and (2) there’re no special factors counseling hesitation.

**Ahmed v. Weyker** (8th Cir. 2020) 984 F.3d 564—no Bivens claim for rogue law-enforcement alleged lies and manipulation landing plaintiffs in jail; **Byrd v. Lamb** (5th Cir. 2021) 990 F.3d 879 (Homeland Security officer allegedly threatened P with a gun in a parking lot).
Miner’s Tips

- Read Complaint
- Trust federal claims & distrust “substantial” federal issue
- Careful about implying private rights of action
Golden Nugget #4: Diversity: Go to Kindergarten

Case Off the Docket By Monday
Diversity Algebra

PLAINTIFFS   DEFENDANTS
Complete Diversity

Plaintiffs: P-1 (MO)  P-2 (MO)
Defendants: D-1 (NY)  D-2 (OH)

28 U.S.C. Sec. 1332
No Complete Diversity

PLAINTIFFS | DEFENDANTS

P-1 (MO) | D-1 (NY)
P-2 (MO) | D-2 (MO)

28 U.S.C. Sec. 1332
If Same state on Both Sides

Mitchell v. Bailey (5th Cir. 2020) 982 F.3d 937--Indian Tribe a stateless entity and defeats diversity; Eckerberg v. Inter-State Studio & Publishing Co. (8th Cir.2017) 860 F.3d 1079 -- that military person assigned to various places did not change his original Florida domicile

Citizens – Not

- States
- United States
- Citizens Domiciled Abroad
- Stateless Aliens

Mitchell v. Bailey (5th Cir. 2020) 982 F.3d 937--Indian Tribe a stateless entity and defeats diversity; Eckerberg v. Inter-State Studio & Publishing Co. (8th Cir.2017) 860 F.3d 1079 -- that military person assigned to various places did not change his original Florida domicile
Citizenship Rules

- If both sides of the document are from the same state, it pertains to:
  - Individuals
  - Corporations
If Same state on Both Sides

All Non-Corporate Entities

See Jet Midwest Int’l Co., Ltd. v. Jet Midwest Group, LLC (8th Cir. 2019) 932 F.3d 1102—citizenship of LLC is citizenship of all its members
Diversity Drilling

Plaintiff

Lambert (VA)

Defendants

You Light ‘Em LLC
Phillips (MO)
Wagstaffe (CA)
Cf. Corporation’s PPB

- Corporation’s principal place of business is where it **controls, coordinates and directs** corporate activities ("nerve center")

*See Hertz Corp. v. Friend* (2010) 559 U.S. 77 – PPB not where majority of business done; *Jet Midwest Int’l Co. v. Jet Midwest Group, LLC* (8th Cir. 2019) 932 F.3d 1102—Hong Kong “limited company” is treated as equivalent to a “corporation”; *3123 SMB LLC v. Horn* (9th Cir. 2018) 880 F.3d 461--newly formed holding company’s nerve center is location where board meetings to be held
Cf. Trust’s Citizenship

**Business Trust**
- “Trust” entities created by statute
  - Citizenship of All Members – SH’s
      - 136 S.Ct. 1012

**Traditional Trust**
- Traditional fiduciary established by private trust document
  - Citizenship of Trustee
      - 2018 U.S. Dist. LEXIS 60514
Miner’s Tips

- Assess citizenship of all parties
- Drill down down “factor tree”
- “Show me the money”
Golden Nugget #5:
Removal to Federal Court?

Burrell v. Bayer Corp.
(4th Cir. 2019)
918 F.3d 372
Removal Jurisdiction?

Suit against Bayer for damages from female sterilization device

Removed as “substantial federal question” since device regulated by FDA subject to federal Medical Device Act (21 U.S.C. § 360(c))

Motion to remand for lack of jurisdiction?
**Burrell v. Bayer Corp. (4th Cir. 2019)**
918 F.3d 372

- No private right of action under federal statute and preemption only defensive and no *Grable* “substantial federal question”

See also *Dalton v. JJSC Properties, LLC* (8th Cir. 2020) 967 F.3d 909—if plaintiff lacks standing to sue, court must remand action to federal court even if claim arises under federal law; *Ellis v. RK Endeavors Springfield, LLC* (W.D. Mo. 2020) 2020 U.S. Dist. LEXIS 2218 (Bough, J.)—no removal of truck driver’s state claims based on selling oil containing THC simply because they involved federal interest in transportation of hemp; but see *Wulschleger v. Royal Canin U.S.A., Inc.* (8th Cir. 2020) 953 F.3d 519—removal jurisdiction proper as to state law unfair practices claim based on buying D’s products based on deception that FDA approved products
Oakland sues producers and promoters of fossil fuels as a public nuisance as part of global warming. D removed as “substantial federal question” under federal common law addressing pollution affecting interstate commerce. Motion to remand for lack of jurisdiction?
City of Oakland v. BP PLC (9th Cir. 2020) 960 F.3d 570

- Climate change liability not removable as state claims do not arise under federal law

See also Bd. of Cnty. Com’rs v. Suncor Energy (USA) (10th Cir. 2020) 965 F.3d 792 (same); Lester E. Cox Med.Ctrs. v. Amneal Pharmaceuticals, LLC (W.D. Mo. 2020) 2020 U.S. Dist. LEXIS 10390 (Ketchmark, J.)—state claims relating to opioid fraud not removable simply because federal government has strong interest in controlled substances
Plaintiff is Jedi Master of Claims Alleged

- Solomon v. Kansas City Public Schools (W.D. Mo. 2020) 2020 U.S. Dist. LEXIS 33519 (Ketchmark, J.)--disability discrimination by student under Missouri law not removable simply because student on Individual Education Plan (IEP)
Removal – Citizenship Proof?

Rhode Island D sued by LLC removes action to federal Court

Removal Notice says: “P is Delaware LLC with PPB in New York” & “P has no members who are citizens of Rhode Island”

How should court rule on the motion to remand?
D.B. Zwirn Special Opportunities Fund v. Mehrota (1st Cir. 2011) 661 F.3d 124

- Yes, if, in fact, no diversity jurisdiction

See Midcap Media Finance, L.L.C. v. Pathway Data, Inc. (5th Cir. 2019) 929 F.3d 310—individuals: must prove domicile not “residence”; corporations: must prove state(s) of incorporation and PPB; West v. Louisville Gas & Elec. Co. (7th Cir. 2020) 951 F.3d 827—identities and citizenship of all partners or LLC members must be revealed; Mensah v. Owners Ins. Co. (8th Cir. 2020) 951 F.3d 941—remand since requested uninsured motorist amount $61,718.67; cf Turtine v. Peterson (8th Cir. 2020) 959 F.3d 873—plausible defamation claims concern more than $75,000
State court wrongful death suit against care facility and its local admin. on elder abuse claim inadeq. care plan

Facility removes asserting individual non-diverse defendant was fraudulently joined

P moves to remand for lack of complete diversity

Sham Joinder Rule: Remand?
Grancare, LLC v. Thrower, By and Through Mills (9th Cir. 2018) 889 F.3d 543

• Defendant not “sham” if there is a possible basis for recovery (not a Rule 12(b)(6) test)

• Administrator could be personally liable (i.e., colorable claim for failure to provide due care)

See Waste Mgt., Inc. v. AIG Specialty Ins. Co. (5th Cir. 2020) 974 F.3d 528—court finds claims adjuster sham party due to conclusory allegations and failure to allege plausible claim; Murphy v. Aurora Loan Services, LLC (8th Cir. 2012) 699 F.3d 1027--fraudulent joinder upheld when negligent misrepresentation claim against law firm barred by established immunity from suit state law protection
Local Defendant – Removal Bar

PLAINTIFFS | DEFENDANTS
--- | ---
P (TX.) | D-1 (NY)
      | D-2 (MO)

28 U.S.C. Sec. 1441(b)(2)
Local Defendant Bar

Holbein v. TAW Enterprises, Inc. (8th Cir. 2020) 983 F.3d 1049

- Statutory bar (28 U.S.C. §1441(b)(2)) applies to served defendants and precludes removal (if raised within 30 days of removal—not “jurisdictional”)

Why Issue an OSC?
Miner’s Tips

REMAND FRIDAY OSC’s

- Test Diversity Allegations
- Make Sure Shams are Sham
- Served Local Defendant
- Untimely Removal
- Waiver
- Distrust “Substantial Federal Q”
- All D’s Did Not Join
Golden Nugget #6:
Decline Supplemental Jx

Robinson v. Town of Marshfield (1st Cir. 2020)
950 F.3d 21
Supplemental Jurisdiction

Fire Chief sues town under ADEA and state law claims for defamation and retaliation based on retaliation for reporting gender discrimination

Court granted summary judgment for town based on unrebutted evidence termination was for morale and performance reasons

Question: Retain supplemental jurisdiction over state law claims?
**DECLINE**

*Robinson v. Town of Marshfield* (1st Cir. 2020) 950 F.3d 21

- After court grants SJ on federal claims, it should decline supplemental jurisdiction when disputed facts on state claim

*King v. City of Crestwood* (8th Cir. 2018) 899 F.3d 643--abuse of discretion to retain supplemental claims; see also *Nuevos Destinos, LLC v. Peck* (8th Cir. June 9, 2021) 2021 U.S. App. LEXIS 17156—once federal question and supplemental claims dismissed, amending to add diversity ground rejected
28 U.S.C. Sec. 1367(c)

- Novel or Complex
- Decline Suppl. Jx.
- Subst. Predomin.
- Other Compelling Reason
- Federal Claim Dismissed
Miner’s Tips

- Test same transaction conclusions
- Wear state judicial hat only when it fits
- Dismiss or remand if federal claim independently disposed before trial
Golden Nugget #7: Personal Jurisdiction

Ford Motor Co. v. Montana 8th Judicial Dist. (2021) 141 S.Ct. 1017
Personal Jurisdiction Exploring

Ford Motor Co. (Mich.) assembled Explorer in Kentucky, sold it to dealership in Washington who sold it to Oregon resident. Explorer purchased and brought to Montana where accident caused death. P reps. allege death due to design defect in vehicle.

Ford owns multiple Montana dealerships, pervasively advertises Explorer in Montana as safe and stable, and sells Explorers in all 50 states. Motion to dismiss for lack of personal jurisdiction?
Specific Jurisdiction 3-Step

1. Purposeful Availment - Direction
2. Arising out of or Related to Forum Contacts
3. Compellingly Unreasonable?
DENY

Ford Motor Co. v. Montana 8th Judicial Dist. (2021) 141 S.Ct. 1017

- Specific jurisdiction if P’s claims arise out of or relate to the D’s forum contacts (“case-linked”). Here, Ford “systematically served” the market, creating “strong relationship” among the defendant, the forum and the litigation.

See also AMA Multimedia, LLC v. Wanat (9th Cir. 2020) 970 F.3d 1201—no personal jurisdiction for infringement claims despite geotagging ads for forum residents; Pederson v. Frost (8th Cir. 2020) 951 F.3d 977--no personal jurisdiction over out-of-state defendants defrauding plaintiff from out-of-state; compare Whaley v. Esebag (8th Cir. 2020) 946 F.3d 447—personal jurisdiction upheld when certain underlying meetings occurred in forum; Myers v. Casino Queen, Inc. (8th Cir. 2012) 689 F.3d 904—personal jurisdiction proper over out-of-state casino harming patrons solicited to gamble at establishment.
Due Process Requires Defendant have certain minimum contacts with forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice.
Personal Jurisdiction Exploring

P exposed to asbestos 25 yrs. ago while living/working in Mass.

P moves to Florida, diagnosed w/mesothelioma and sues Union Carbide for prior exposure & failure to warn

Union Carbide (NY-inc./PPB TX) registered in FL to do business, has agent for SOP, distributor, plant, terminal & asbestos sales there

Motion to dismiss for lack of personal jurisdiction?
No general jurisdiction since UC not “at home” in Florida and no specific jurisdiction since UC’s Florida contacts not specifically related to asbestos liability.

For Limited Personal Jurisdiction, Count the Minimum Contact “Rocks” Related to the Cause of Action Itself (i.e., don’t count the unrelated trade show attendance)
Miner’s Tips

• Count the contacts as “rocks on a pile”
• Look solely at D’s forum-based contacts
• Keep a close eye on electronic contacts
Changing the Playing Field

Forum Selection Clauses
Forum Selection Clause Issues

Mandatory or Permissive

Signator and Scope

Atlantic Marine Constr. Co. (VA) > Contracts with Army Corps of Engineers

Subcontracts with J-Crew Management (TX) > Ford Hood, Texas
Mandatory Forum Selection for All Disputes Between Parties

Circuit Court City of Norfolk, Virginia

or

Fort Hood to Norfolk, VA

1,523 Miles
Impact of Atlantic Marine

Private Interests Irrelevant

Presumptive Enforcement

No Deference to P’s Choice of Forum

Law of Transferee Court
Golden Nugget #8: Choosing a Mine

Lewis v. Liberty Mutual Ins. Co.
(9th Cir. 2020) 953 F.3d 1160
Forum Selection Clause Exploring

P’s get award against mfgr. who declares bankruptcy.
P’s bring direct action against insurer for mfgr.

Insurance contract has forum selection clause designating litigation in Australia.

Forum selection clause governs venue?
Lewis v. Liberty Mutual Ins. Co. (9th Cir. 2020) 953 F.3d 1160

• Forum clause applies to party suing derivatively through contract

See DeRoy v. Carnival Corp. (11th Cir. 2020) 963 F.3d 1302—forum selection clause can limit venue solely to designated federal court forum if jurisdiction exists; Sierra Frac Sand, LLC v. CDE Global Ltd. (5th Cir. 2020) 960 F.3d 200—forum clause in incorporated terms and conditions governs; Becker v. U.S. Dist. Ct. (9th Cir. 2021) 993 F.3d 731—forum clause in ERISA plan relocates California employee to Minnesota where plan administered; Howmedica Osteonics Corp. (3d Cir. 2017) 867 F.3d 390—clause analyzed involving non-signatories
Waiver of Removal By Contract?

- Mutual Confidentiality Agreement
- Consent to “sole and exclusive jurisdiction of the courts of Harris County, Texas”
- ISSUE?
- Attempted removal to federal court
**RULE**

**Grand View v. Helix Electric (5th Cir. 2017) 847 F.3d 255**

- Valid and enforceable clause unequivocally selecting state court as exclusive venue waives party’s right to remove

- *City of Albany v. CH2M Hill, Inc. (9th Cir. 2019) 924 F.3d 1306*—forum clause selecting state county where no federal court located bars removal; *Azima v. RAK Inv. Authority* (D.C. Cir. 2019) 926 F.3d 870—forum clause selecting England for litigation enforceable; *Sofamor Danek, Inc. v. Gannon* (8th Cir. 2019) 913 F.3d 704—defendant waived right to remove by entering into related agreement stating claims “arising out of or related to this Agreement must be litigated in Minnesota state court”; *Autoridad de Energia Electrica v. Vitol S.A.* (1st Cir. 2017) 859 F.3d 140—waiver for one defendant waives for all; TWG §8-VII[A][2]
Miner’s Tips

- Always, always read the forum selection clause
- Remember, such clauses are presumptively enforceable (and trump private interests)
- Forum clause can preclude (or require) federal court venue
Golden Nugget #9
Twiqbal

Wysong Corp. v. Apri Inc.
(6th Cir. 2018)
889 F.3d 267
A Twiqbal Case

Lanham Act claim - false advertising of dog food

Ads display photos of prime cuts of meat, chicken & fish

MTD: Implausible per judicial experience & common sense
GRANT

**Wysong Corp. v. Apri, Inc.** (6th Cir. 2018) 889 F.3d 267

“The defendant’s product is dog food. Common sense dictates that reasonable consumers are unlikely to expect that dog food is made from the same meat as people eat.”

See; *Tomasella v. Nestle USA* (1st Cir. 2020) 962 F.3d 60—no plausible liability for ad omitting that worst form of child labor used to make chocolate product; *East Coast Test Prep LLC v. Allnurses.com, Inc.* (8th Cir. 2020) 971 F.3d 747—alleging “possibility” defendant “was wholly or partially responsible” for creating false posts not sufficient for trade libel claim
Twombly/Iqbal: Two-Step

TI - TWO STEP

Ignore Conclusory Allegations

Consider allegations showing plausible entitlement to relief
“Hot” New Twiqbal Rulings

Sex discrimination and hostile work environment claims implausible since plaintiff’s sex not motivating factor in termination and alleged incidents sporadic and not poisoning work environment--Warmington v. Board of Regents of the Univ. of Minnesota (8th Cir. 2021) 2021 U.S. App. LEXIS 15326

Allegations in ADA case against Tesla that it “failed to provide accessible service counters” was conclusory and did not meet Twiqbal pleading standards--Whitaker v. Tesla Motors, Inc. (9th Cir. 2021) 985 F.3d 1173

Conclusory allegation of “actual malice” in defamation suit insufficient--Nelson Auto Ctr. v. Multimedia Holdings Corp. (8th Cir. 2021) 951 F.3d 952; see also Walker v. Beaumont Indpt. Sch. Dist. (5th Cir. 2019) 936 F.3d 72
Plausibility & Affirmative Defenses

• **Lawyer Question**: Does the plausibility standard of *Iqbal/Twombly* apply to affirmative defenses?

• **Search Query**: “affirmative defense /5 plausible”

• **Results**: Click highlighted “affirmative defense” and it takes you to ¶19.190 “Pleading Plausible Affirmative Defense” and a brief scroll up to ¶19.187 reflects the court decisions on this question.

• **Answer**: GEOMC Co. v. Calmare Therapeutics, Inc. (2d Cir. 2019) 918 F.3d. 92—*Twombly/Iqbal* apply to pleading of affirmative defenses (e.g. comparative negligence, failure to join a necessary party)
THINGS I HATE
1. VANDALISM
2. IRONY
3. LISTS
Golden Nugget #10

_Erie: Substance or Procedure_

Plaintiff sues defendants in Perry County for injuries sustained in automobile accident.

D removes on diversity grounds and moves to strike claim for punitive damages under Mo. Revised Statute § 510.261(5)—no pleading of punitives until leave of court.

Does punitive damage pleading tort reform statute apply in Federal Court?
NO – DOESN’T APPLY


- Fed. R. Civ. P. 8 is on point and covers the requirements for pleading punitive damages in federal court
Erie Railroad & Harry Tompkins
State Substance

Erie Railroad v. Tompkins

Federal Procedure
ERIE RAILROAD CO. v. TOMPKINS

In a landmark decision, the U.S. Supreme Court ruled in 1938 that, in cases between citizens of different states, federal courts must apply state common law, not federal “general common law.” Under Pennsylvania common law, Harry Tompkins of Hughestown lost his case against the Erie Railroad, a New York State company. Tompkins had been struck by an unsecured door of a passing train and severely injured near this spot on July 27, 1934.

PENNSYLVANIA HISTORICAL AND MUSEUM COMMISSION 1977
State Tort Reforms in Federal Court?

- **Certificate of Merits**
  (Mo. Rev. Stat. § 538.225)

- **Damage Caps**

- **Expert Testimony Requirements**
  (Mo. Rev. Stat. § 537.528(1))

- **Class Action Limits**

- **Anti-SLAPP Statutes**
  (Mo. Rev. Stat. § 537.528(1))

- **Sanctions Reform**

- **ADR**

- **Pleading Punitive Damages**
  (Missouri Rev. Stat. § 510.261.5)
State Anti-SLAPP Statutes Apply in Federal Court?

**YES**


**NO**

Certificates of Merit Required?

**YES**


**NO**

No Punitives Without Leave of Court?

**YES**


**NO**

State Tort Reforms in Federal Court?

State Procedure Serving Specific Substantive Goal

Intention to influence substantive outcome manifest

Goal defeated if not applied in federal diversity suit
As a civil procedure professor and practice guide author for some thirty years, I do indeed get it that law students and lawyers have trouble applying the tectonic rule enunciated in 1938 by the Supreme Court in Erie R. Co. v. Tompkins. And certainly it means more than remembering a high profile federal personal injury lawsuit revolving around Harry Tompkins’ tragic loss of a limb in a depression-era railroad accident in Hughestown, Pennsylvania.

In the last few years, the Erie rule has been on a high speed rail journey as it traverses the 21st Century phenomenon of state tort reform. From state house to state house across this country, local legislators are passing laws imposing seemingly procedural barriers to curb perceived threats of frivolous lawsuits. The question is whether they must be applied in federal court actions.

The Erie rule is deceptively simple: if there is a state law claim in federal court (via diversity or supplemental jurisdiction), the court will apply state substantive and federal procedural laws. Simple perhaps – but the U.S. Supreme Court itself commented that the classification of a law as substantive or procedural can be a “challenging endeavor.”

Every law student and lawyer should know that the Erie decision is in the Top Ten cases of all time, and for good reason. Disallowing federal courts to intuit general federal common law as part of an otherwise state law claim raised serious and vital issues of separation of powers, federalism, judicial administration, and all to say nothing of questions concerning the tactical manipulation of procedural and jurisdictional rules when initiating or removing actions.

Let’s take an important and current example of state legislative tort reform in an area where the federal courts are completely split as to whether it applies in federal court: state anti-SLAPP statutes designed to authorize the prompt striking of unsupported lawsuits arising from a defendant’s exercise of free speech or petitioning rights. Since most of these statutes enacted in some thirty states allow for the shifting of attorney’s fees and an immediate appeal, they present a powerful shield in the litigator’s toolbox.

As stated, the federal circuits are deeply split as to whether the nominally “procedural” anti-SLAPP dismissal statutes nevertheless should be applied in federal court as part of manifest attempts by state legislatures to achieve substantive objectives. This important debate involves two competing analytic camps: one, reasoning that the state statutes reflect substantive commands, and the other concluding that Fed. R. Civ. P. 12 and 56 answer the same question (i.e., when and how a court dismisses a case before trial) and therefore must be applied notwithstanding contrary state rules.

Defining what is substantive and what is procedural is an illuminating first step. A law is substantive if it is bound up with the rights and obligations of state law (e.g., elements of a claim or defense, burden of proof, statutes of limitations, choice of law, damage caps, etc.). In contrast, a law is treated as procedural if it affects the manner and means of the claim’s presentation, i.e., merely a form and mode of enforcing a state law (e.g., pleading standards, class action rules, discovery, dismissal for failure to prosecute, briefing rules, etc.).

But as law students and historians have been telling me for decades, the definitions are easy to state and hard to apply. For example, many facially procedural rules such as the time limits for serving a complaint or requiring out-of-state defendants to post a bond can often be outcome determinative despite the obvious fact they are contained in self-described procedural rules. Comparatively, courts uniformly rule that the right to prejudgment interest is a substantive part of the damages analysis, yet obtaining post-judgment interest has long been held to be a procedural rule governed by the law of the sovereignty (state or federal) in which the judgment was obtained.
Other Recent Developments

Staying Ahead
Hot New Golden Nugget
Rule 30(b)(6)

Amendment Effective:
December 1, 2020
NEW RULES AND PRACTICES 2021

Conferral Mandate for Corporate Designee Depos

Re: Confer in Good Faith About the Matters for Examination
Modern Mining

Virtual World Litigation
Appear Virtually

Courts
Arbitrations
Mediations

“7 Steps to Romancing the Virtual Classroom”
J. Wagstaffe (LAW360, May 2020)
Testify Virtually

Trials
(FRCP 43(a))

Depositions
(FRCP 30(b)(4))

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